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FILED
AUG 2 1982
ALEXANDER L. STEVAS,
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82-175

In the

Supreme Court of the United States

October Term, 1982

No. ____

United States of America
Respondent

V.

Tommy Swarek
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether the standard for determining when a new trial should be granted on the basis of newly discovered evidence is violative of the due process of law clause of the Fifth Amendment to the United States Constitution when a defendant's alleged sole co-conspirator has been rendered unavailable to present exculpatory testimony and evidence at his co-defendant's trial.

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Tommy Swarek, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, filed May 7, 1982, is attached hereto as Appendix, Infra, (pp. A1-A). The June 3, 1982, denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc is attached as Appendix B, infra (p. A-7)

JURISDICTION

The judgment of the Court of Appeals was entered May 7, 1982. A timely Petition for rehearing and request for

rehearing en banc was denied June 3, 1982. This Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

FEDERAL STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §371 states that:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Rule 33 of the Federal Rules of Criminal Procedure states that:

> The Court on Motion of a Defendant may grant a new trial to him if required in the interest of justice. If trial was by the Court without a jury, the Court on Motion of a Defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A Motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the Court may grant the Motion only on remand of the case. A Motion for new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the Court may fix during the 7-day period.

The Fifth Amendment to the United States Constitution states that:

> **No person shall be deprived of life, liberty or property without due process of law.**

STATEMENT OF THE CASE

The Petitioner, Tommy Swarek, and W. R. Smith, Sr., were jointly indicted by the Grand Jury for the Eastern District of Arkansas and charged with one count each of conspiracy to defraud the United States in violation of 18 U.S.C. §371.

The indictment, in summary form, charged W.R. Smith, Sr., Chairman of the Board of Venture Capital, Inc., a Small Business Investment Company (SBIC) licensed by the Small Business Administration in accordance with the Small Business Investment Act of 1958, with conspiring with Petitioner, a business man and sole shareholder of a corporation which owned various properties including an oil refinery and an unreleased motion picture, in the following respects:

1. W. R. Smith, Sr. and Tommy Swarek unlawfully, willfully and knowingly conspired among themselves, and with other persons unknown to the Grand Jury, to defraud the United States SBA in connection with its SBIC objectives by (a) having Smith, an officer of Venture, make a false entry in an SBA Form 1022A which represented that Venture had increased it's paid-in capital and surplus by $500,000.00 when in fact $400,000.00 of that increase was not bona fide, and therefore not true; and (b) by causing Venture to make two (2) loans to corporations owned by Swarek with those funds being used to purchase a CD to secure Smith's loan from the Planter's Bank of Opelousas; and (c) causing Smith's loan to be deposited in an account at Planters in the name of Venture and utilized as new private capital in Venture, all purportedly in violation of an SBA regulation.

2. As a part of the conspiracy the defendants (a) would negotiate a $400,000.00 loan from the Planter's Bank to Smith and use the proceeds to accomplish a spurious increase in the private paid-in capital and surplus of Venture; (b) would, on November 7, 1977, cause the proceeds of the loan, together

with $100,000.00 from another source, to be deposited in an account of Venture at Planter's Bank and a letter from that Bank to be forwarded to the SBA evidencing such deposit and that the deposit of $500,000.00 represented additional capital of Venture; (c) since Planter's Bank required as additional security a $400,000.00 CD, defendant Smith would cause Venture to make loans to two (2) businesses organized by Swarek to purchase property from a corporation owned and controlled by Swarek; (d) would cause the borrowers to write checks totalling of $400,000.00 to Swarek's corporation and cause that corporation to in turn write a $400,000.00 check to another corporation owned and controlled by Swarek which would then buy a $400,000.00 CD to be placed as collateral on the $400,000.00 loan by Planter's to Smith. The proceeds of the loan would go into the account of Venture and, together with the $100,000.00 deposit from another source, would be represented as new capital in Venture; and (e) would finally fraudently prepare and cause to be prepared and delivered to the SBA an application for funds evidencing that Venture had $500,000.00 in new capital which they knew consisted in part funds deposited in the Venture bank account that had been generated in violation of SBA regulations and which represented a sham and spurious increase in the capital of Venture for the purpose and with the intent of deceiving the SBA in order to obtain funds from the SBA.

The Grand Jury did not indict either Defendant of a substative criminal act.

After the indictment was returned (September, 1979) Smith suffered a complete mental and physical breakdown which caused the trial court to grant several continuances and ultimately a severance, upon motion by the Government, due to the fact that the problems prevented Smith from effectively assisting his counsel in the preparation of his defense. Over Swarek's objection, the trial court continued Smith's case indefinitely and ordered Swarek to stand trial notwithstanding his contention that

the availability of Smith would be essential to his defense and trial preparation.

Swarek was tried and convicted of the charges in the indictment on October 2, 1980. He was subsequently sentenced to a term of imprisonment and a fine. Swarek appealed his conviction and while Swarek's case was pending before the Court of Appeals, Smith was tried on February 17, 1981 on the charges and acquitted.

On November 30, 1981, Swarek filed a Motion for New Trial based upon newly discovered evidence. The trial court denied Swarek's Motion and the Court of Appeals affirmed the trial court's judgment holding that Swarek had not established that the newly discovered evidence (Smith's testimony and cooperation) would probably result in an acquittal on retrial. However, the Court of Appeals held that there was no substance to the government's contention that the jury could have found that Swarek conspired with someone other than Smith (App., infra, p. A-5).

REASONS FOR GRANTING THE WRIT

Swarek's case presents a unique and critical question which has not been addressed by this Court and for which the various Circuit Courts of Appeal are presently without guidance. Swarek's case also presents a fundamental question of procedural due process of law. That question is whether the standard for determining when a new trial should be granted on the basis of newly discovered evidence is violative of the due process clause of the Fifth Amendment to the United States Constitution when a Defendant's alleged co-conspirator has been rendered unavailable to present exculpatory testimony and evidence at his co-defendant's trial.

The historical test governing the prerequisites which must ordinarily be met to justify the granting of a new trial on the basis of newly discovered evidence is undeniably uniform among the circuits. *United States v. Ward*, 544 F.2d 975, 977 (8th Cir. 1976); 2 Wright and Miller, Federal Practice and Procedure §557 (1969). However, new trials on this basis are hardly ever granted since the Petitioners are generally unable to fulfill the first four prerequisites announced by the Eighth Circuit and only rarely the fifth (App., infra, p. A-4), eg, *Coates v. United States*, 174 F.2d 959 (DC Cir. 1949).

This case presents a unique factual situation of significant constitutional dimensions since it seeks to focus on the fifth prerequisite and its application to the complex conspiracy case involving two alleged conspirators. What should be the standard for determining when newly discovered evidence, which meets the first four prerequisites, is "of such a nature, on a new trial, that the evidence would probably produce an acquittal"? This court has not addressed this issue and it is one which has a significant effect on a defendant's right to a fair trial. The Eighth Circuit Court of Appeals, for all practical purposes, held that Swarek met the first four prerequisites but failed

to establish "that the testimony of Smith would probably result in (his) acquittal on a retrial" (App., infra, p. A-4). The Eighth Circuit cited *United States v. Goehring*, 585 F.2d 371, 373 (8th Cir. 1978) in support of this proposition. Under this approach the standard to be applied in such a serious and material instance is a subjective one which imposes upon a defendant the impossible task of proving that with the benefit of the newly discovered evidence he would be acquitted on retrial without giving him the means to present such evidence to a trier of fact.

Judge Learned Hand recognized many years ago that a defendant may have a "lively interest" in securing the testimony of an accused at the trial of another accused. *United States v. Bronson*, 145 F.2d 939, 943 (2nd Cir. 1944). The impact this type of evidence would have in a two person conspiracy case founded entirely on circumstantial evidence is beyond debate. Without Smith's testimony at Swarek's trial there was no way for the jury to conclude anything else but that a false statement existed in an SBA application that Smith signed and that circumstantially at least, Smith knew of its contents and participated in every facet of its creation, preparation and submission. Without Smith's testimony as to what he did and what he knew, Swarek was at an extreme disadvantage. The charge was that Smith and Swarek conspired to submit a false application to the SBA. Under the charge, and the findings of the Eighth Circuit, if Smith did not commit the crime then Swarek could not have committed the crime. In addition, a critical part of the government's case was the allegation, that in effect, the loan providing the additional paid-in capital came from Venture, rather than a third party source.

Accepting, arguendo, that the net result of the transaction as established by the government was unlawful, what then could Smith testify to which would effectively negate the existence of a conspiracy between himself and Swarek to accomplish this unlawful act? First, Smith would testify that he did not know about the CD and the fact that

it was pledged as security for his loan, and was not at the November 7, 1977 meeting where the pledge documents were executed. Secondly, Smith would testify that his loan was a personal one for which he was personally liable. Third, Smith would testify that he didn't submit or cause to be submitted any false information to the SBA since he did not prepare or have anything to do with the preparation of the loan application, and would also testify that, to his knowledge, no false information was submitted or intended to be submitted to the SBA. Fourth, Smith would testify that to his knowledge the loans to purchase the movie and the oil refinery were legitimate loans to purchase real assets. This evidence was not available to Swarek from any other witness and would have had an undeniable impact on the jury at Swarek's trial. Finally, since the government's case was totally circumstantial, the government relied heavily on documentation and other items of circumstance to establish the charges in Swarek's case. There were no other eye witnesses to the alleged conspiracy other than Smith and he is now available to testify on behalf of Swarek at a new trial. Smith is a man of substantial credibility and also processes documentation and other witnesses to support his testimony which was not available to Swarek at the time of Swarek's trial.

If the defendant has the burden of proof in situations such as those in this case, a presumption should exist that the evidence would have made a significant difference and would in all probability produce an acquittal when the defendant satisfies the first four prerequisites, and the burden should then shift to the government to rebut such a presumption. Where reasonable men could differ on the question of the probability of an acquittal on retrial, the decision in such cases should be in favor of a new trial to protect the defendant's right to a full and fair trial. The real question in this case involves an issue of due process of law. Swarek did not have access or even the opportunity to obtain Smith's evidence. That evidence included not only

Smith's denials, which would have been of extreme importance in Swarek's trial since the government relied totally on circumstantial evidence to prove it's conspiracy, but also documents and additional witnesses. The circumstances of this case present the same type of circumstance when a trial court instructs a jury that if it views the evidence in a case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence. The same type of situation is presented to this Court, that is, one of probability of acquittal or probability of conviction. The standard for determining whether the probability of acquittal exists should not be a subjective one having as its foundation a requirement that the defendant prove an acquittal would result without the benefit of a new trial. Swarek was, over his objections, required to defend himself against a complex criminal conspiracy case without benefit of the assistance or testimony of the only alleged co-conspirator. The fraud which Swarek is alleged to have conspired to perpetrate involved transactions between a company wholly owned by the co-conspirator and the Small Business Administration. The Government, during Swarek's trial, was able to set Smith up as a "straw man" and convict Swarek of conspiracy through inference and innuendo with Smith who was not present to offer the most reliable evidence about his own actions.

If the Eighth Circuit Court of Appeals is willing, as they appear to be, to impose upon a defendant the onerous burden of proving, when all other prerequisites have been met, that his newly discovered evidence would probably result in his acquittal on retrial, then the Eighth Circuit would be establishing an improper precedent that will undoubtedly be persuasive on other Circuits which may consider the same issue.

As the use of consipracy charges increases, it is of vital importance that this Court declare a standard to be applied for the granting of new trials on newly discovered evidence which

is not violative of a defendant's right to due process of law and a fair trial.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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